



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1491 of 2011**

**JANE FRANCES OMINDE MUNYAKOH .....CLAIMANT**

**VERSUS**

**IMAGING SOLUTIONS LIMITED .....RESPONDENT**

**JUDGEMENT**

This is a claim dated 1st September 2011 for unfair and wrongful termination of the claimant from the employment of the respondent. A defence dated 29th September 2011 denying that the claimant was terminated as alleged.

In the memorandum of claimant, the Claimant stated that she was employed by the Respondent as an Administrative and Logistics Assistant having worked for Kodak Kenya Limited which outsourced its business to the respondent and the Claimant entered a new contract from 22nd February 2005 with the respondent at a monthly salary of Kshs.67, 294.50 per month. That on 22nd July 2011 she was terminated on the grounds of being rude and use of vulgar language to her immediate supervisor whereas the Claimant had asked the Finance Officer to refrain from banging and hanging her phone whenever she felt irritated which actions according to the claimant were rude and unprofessional. That these reasons for termination were malicious and that she was never called to defend herself or any other previous misconduct which was against natural justice.

That there was no notice of the termination or her dues paid and thus the same was unfair in the circumstance and claims for 12 months compensation, notice pay, and leave days not taken.

It was her evidence that she moved from Kodak Kenya Limited through a business re-organisation outsourced to the respondent. That at the material time she was standing in for her assistant who was on leave but also required to do her duties thus in charge of two departments of Logistic support and Support as well as manning the reception duties, customer services and other administrative duties. She was under immense pressure juggling between the various tasks. That on 22nd July 2011 while on duty, the Finance Manager called her seeking to know why some products were not appropriately placed into the system as required for a period of over five (5) months and Claimant proceeded to informed her that since she was dealing with so many products and duties and needed to refer to her file records to be able to give feedback. That apparently the Finance Manager was not happy with her despite responding to every question or undertaking her duties as directed.

The claimant further stated that following these back and forth directives from the Finance Manager, agitated she called her over the phone at 4 pm and demanded to know where one of the cameras left for repairs was. That the Claimant should not have taken that product from the customer since he was not in good standing in his payments with the respondent. The Claimant was emphatic that such enquiries were not within her duties as this was for Marketing. That at this instance, the Finance Manager banged the

phone on the Claimant.

That the Claimant immediately went to the Finance Manager's office and asked her not to bang the phone and that if there were issues not done well it was unprofessional to bang the phone. That after some time following this incident, she was summoned to the office and handed a letter and asked to sign and leave the office immediately. The letter issued was a summary dismissal. This was the last communication from the respondent.

That even though she worked for Kodak previously, she was on a new contract with the respondent which required that before termination each party to give the other one month notice or pay in lieu of notice. That in the contract there were acts if committed would amount to summary dismissal but the claimant was not guilty of any of the grounds and thus her termination was unfair and seeks compensation, notice pay and pay for leave days not taken.

On cross-examination the Claimant insisted that her termination was malicious and she was never paid her terminal dues. That when she got the termination letter on 22nd July 2011, she did not have any company property and therefore nothing for clearance and that she should have been paid her dues immediately.

The Respondent on the other hand, stated that when Eastman Kodak Company (Kodak) shut down its subsidiaries in Africa the respondent took over distributorship contract with Kodak together with assets and liabilities, thus the hiring of the Claimant who had been declared redundant by Kodak. That on 22nd July 2011 the Claimant was dismissed for the reasons of being rude and use of vulgar language to her immediate supervisor, the Finance Manager that was against company policy. That she refused to attend to customer service calls unless asked by the MD. That on 1st of July 2011 the finance manager sought to know why end month spares inventory was not being reconfirmed with Amazon where she retorted that she was not "seating your ass" doing nothing as customer service. Further that when she was asked whether Asis Photo had paid camera repair charges, she shouted back to the effect that she needed to check and then stormed into the Finance Manager's officer and shouted that she should not hang up her phone on you ever again.

That these acts created an environment that was unfit for business and hence the summary dismissal. That under the contract the respondent was to give outstanding leave days and one month salary in lieu of notice to be paid upon clearance with the Finance Manager. That indeed the Claimant was offered the following:

- a) Kshs. 67,294.50 for one month salary in lieu of notice
- b) Kshs.24,470.72 being 8 leave days
- c) Kshs.21,462.20 being PAYE

In evidence the Respondent called Lydia Wachira the Finance Manager of the respondent who stated that she started work with the respondent on 1st October on 2012 and did not work with the Claimant but has her file and what was recorded. Since the claimant received her termination letter she has not collected her terminal dues and this is issued upon clearance with the respondent. That the Respondent admits owing Kshs. 67,294.50 for one month salary in lieu of notice, Kshs.24, 470.72 being 8 leave days less PAYE of Kshs.21, 462.20 all amounting to Kshs. 70,312.00.

She further stated that the Respondent practice was all hiring and termination was done by the MD as the overall person but the Finance manger had some human resource functions but would also report to the MD. That the Claimant was terminated due to insubordination which amounts to summary dismissal which was proper in the circumstances of the case noting the reasons indicated in the letter of termination.

#### Analysis of the case

Unfair and wrongful termination. It is not in dispute that the Respondent was summarily dismissed vide letter dated 22nd July 2011 for what the Respondent referred to as 'insubordination'.Section 44 (4) of the

Employment Act has laid out clearly the matters which if committed by an employee would attract summary dismissal. Of relevance to the issue at hand is Section 44(4) (d) and (e) which provides that an employee may be dismissed summarily if:

*An employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer. an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.*

However, before invoking the provisions of Section 44(4) of the Employment Act, an employer is under a statutory obligation pursuant to Section 41(2) to give an audience to the employee who is subject to the dismissal so that the employee can make representations and which representations the employer should consider before making a decision to dismiss the employee.

This is what is universally referred to as procedural fairness within the industrial relations legal framework. Procedural fairness has its antecedents in the rules of natural justice. Basically it requires that before making a decision affecting another person's rights or interests, that other person should be given a hearing. But it appears that this rule or procedural fairness has not always been part of the employment or contractual relationship in Kenya or of the common law as established in the case of *Rift Valley Textiles Limited v Edward Onyango Oganda, Civil Appeal No. 27 of 1992*, the Employment Act, 2007 has caused a fundamental shift on the applicability of the rules of natural justice in the employment arena in Kenya. Section 41(2) of the Employment Act, 2007 now makes it obligatory for an employer who wishes to terminate the services of an employee to notify such employee and hear any representations which the employee may wish to make before taking the decision to terminate or not to terminate. The obligation to hear the employee is applicable whether the employer intends to make payment in lieu of notice or not. It is even applicable where the employee is accused of gross misconduct.

In the instant case, the Respondent did not plead that it gave the Claimant the opportunity to make any representations nor is there evidence that it extended to the Claimant the opportunity to make representations and therefore the procedural requirements were not followed.

However, I must hasten to add, the law as it stands will remain so in our book unless Courts read the law by breathing life into it. That is why parties appear in Court to give evidence, sworn or unsworn to facilitate the Court assessment of the circumstance of each case and give a party that was denied the opportunity to tell their story do so in an environment free from bias and intimidation.

This Court noted carefully both parties in the hearing process and particularly the demeanor of the Claimant. She was rush, loud and in a hurry to state her case. But why is this relevant? This is important noting that under the letter of termination the reasons given by the Respondent for her termination are multiple:

*[1] following several occasions where you have been verbally rude and used vulgar language to your immediate supervisor*

*[2] you were requested to answer to customer service calls and out rightly refused to do so unless called by the MD*

*[3] on 1st July 2011, the finance manager sought to know why end month spares inventory was not being reconfirmed with Amazon, only for you to answer back that you were not "seating your ass" doing nothing at customer service*

*[4] today, on being queried whether Asis Photo had paid for their camera repair charges, you shouted back to the effect that you need to check. You then stormed into the Finance Manager's office and shouted that she should not hang up the phone on you ever again.*

These are the four (4) grounds used for the summary dismissal.

As noted above on the evidence of the Claimant, she alluded to some of the grounds for her dismissal particularly the fact that the Finance Officer appeared to frustrate her situation particularly on 22nd July 2011 the day of her termination as this officer called her over the phone and banged it where the Claimant '...immediately went to the Finance Manager's office and asked her not to bang the phone and that if

*there were issues not done well it was unprofessional to bang the phone...'*. These were her words in verbatim.

The Claimant further noted that the Finance Manager had called her '*...while agitated*' and once the '*phone was banged*', she '*... I immediately went to the Finance Manager's office...*' and made some demands that it was '*unprofessional to bang the phone*'. If these are indeed the events of this day as stated by the Claimant and observing her demeanor in Court, I noted her agitation, anger and anxiety and looking at the reasons for her dismissal, it was highly possible she was rude to her supervisor and hence the harsh sanction given by the Respondent.

I also note she was overwhelmed with her duties since she was in charge of two departments and thus already felt by her supervisor calling to demand more from her was being unfair. This can be frustrating to any employee causing them to be rash, anxious, and rude and even use of bad language out of a feeling that she was being unfairly to go beyond what was humanly possible.

This attitude was also noted of the Claimant when she was advised to collect her dues as calculated by the Respondent. She stated in evidence that she did not own any property of the respondent and hence had nothing to clear. This Court notes that this behavior on the part of the Claimant does not serve any progressive purpose. She could have received the money on a without prejudice basis. But she opted not to collect the money on the mistaken belief that she had nothing to clear. If indeed there was nothing to clear, she should have filed the necessary forms and left them with the Respondent to facilitate her access to her dues that were already acknowledged.

But this was an office environment. Not a private home. There are rules and regulations at the place of work. There has to be a manager and a team willing to be supervised. Otherwise, no work will be done or the environment will not be conducive for work or for the business as the one the respondent is engaged in. Thus the failure by the Claimant to effectively respond to her supervisor as and when called upon and the eventual move to the supervisor's office to indicate that they were not being professional borders to an act uncalled for in a supervisor and the one to be supervised relationship. This is not what one does to their supervisor. A supervisor is put there for a good reason, having met the prerequisite for the job and for a junior officer to approach a supervisor with 'advice' that they 'are not professional' is indicative of bad attitude, rashness, and disrespect. A reasonable person does not do this. They respect authority and abide with lawful directions.

What the supervisor wanted to establish from the Claimant was within the work requirements of the respondent. The Claimant did not challenge the evidence that she had used bad language, refused to answer the customer service calls or confirm why end month inventory were not confirmed. These were duties within the knowledge of the claimant and any supervisor would have followed up on them. To instead challenge the supervisor 'advising her to be professional ... and not to bang the phone' was uncalled for in the circumstances.

This is what was contemplated by Section 44(4)(d) that employees should not use abusing and bad language at the place of work.

Thus failure to comply with a reasonable expectation at work is equivalent to disobedience of lawful orders as stipulated under Section 44(4) (e); ***...knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.***

The failure to comply with a lawful order amount to a condition for summary dismissal. As a general rule, for insubordination to constitute misconduct justifying a dismissal it has to be shown that the employee deliberately refused to obey a reasonable and lawful order. In ***Ntsibamde versus Union Carriage & Wagon Co (Pty) Ltd (1993) 14 ILJ 1566 (I C)***, it was stated:

*As a general principle it may be stated that the breach of rules laid down by an employer or the refusal to obey an employer's lawful and reasonable order is to be viewed in a serious light and may in given circumstances even justify summary dismissal. However, the presence of certain prerequisites is required. In the first place, it should be evident that an order, which may even be in the form of a warning, must in fact have been given. . . . In the second place, it is required that the order must be lawful; an employee is therefore not expected to obey an unlawful order such as to work illegal overtime. Thirdly, the reasonableness of an order should be beyond reproach and will be enquired into: in cases before the court the order or request has sometimes been found to be reasonable and at other times to be*

*unreasonable. In addition, it is required . . . that the refusal to obey must have been serious enough to warrant dismissal.*

Insubordination is a serious offence because it presupposes a calculated breach by the employee of the duty to obey the employer's instructions. The law requires that defiance must be 'gross' to justify dismissal. This means that the insubordination must be serious, persistent and deliberate, and that the employer should adduce proof that the employee was in fact guilty of defying an instruction. The gravity of the insubordination (or indeed of whether the refusal to obey an instruction amounts to insubordination) depends on a number of factors, including the action of the employer prior to the number of factors including the employee's prior alleged insubordination, the willfulness of the employee's defiance and the reasonableness or otherwise of the order that was defied. So refusal to obey instruction by the employee to do work which it was legal and within their duty description is insubordination. As held in the case of *Lynx Geosystem SA (PTY) Ltd versus Raynold Braacks and Others, (2005) JR1935/05*.

*In addition it is an important principle in labour jurisprudence that employers should be consistent in their application of discipline in their organisation and that they should charge all employees where the company's rules had been breached.*

Thus analyzed, under Kenyan law the Employment Act makes it mandatory under Section 41(2) to give audience to an employee to give her defence before summary dismissal. As stated above, this was not done and there is no other conclusion I can reach except that the dismissal of the Claimant was procedurally unfair. The rules of natural justice were not observed.

The claim for notice pay for one month was admitted by the respondent subject to making clearance with the Finance Manager of the Respondent. This is a common practice appreciated by Court that employers in Kenya, before payment of terminal dues require staff to indicate that nothing is outstanding hence a process of 'clearance'. This claim is admitted and Court will direct Claimant to collect the same.

On leave not taken, 8 days are admitted whereas the Claimant had asked for 7 days. This having been admitted the Court will also direct the Claimant to collect the same from the Respondent.

Having established there was procedural unfairness in the termination of the Claimant, this Court will award compensation of one month pay amounting to Kshs. 67,296.50

All payments are subject to statutory deductions. This must be done by the Respondent.

**Court will therefore enter judgement for the Claimant in the following terms:**

**a) The termination was unfair**

**i. Compensation of Kshs.67,296.50 be paid**

**b) Admitted claim subject to statutory deductions**

**i. Notice pay due amounting to Kshs. 67,296.00, subject to statutory deductions**

**ii. Leave days amounting to 24,470.72, subject to statutory deductions.**

**c) Each party to bear their own costs.**

**Dated and delivered in open Court this 26th Day of February 2013.**

**M. Mbaru**

**Judge,**

**Industrial Court of Kenya**